



**Farnan, District Judge.**

Pending before the Court is a Motion To Renew Motion Under 28 U.S.C. § 2255 And For Leave To Amend Motion Under 28 U.S.C. § 2255 (D.I. 200) filed by Defendant, Thomas E. Flaherty. For the reasons set forth below, the Court will grant Defendant's Motion To Renew his Section 2255 Motion (D.I. 200), grant Defendant's Motion For Leave To Amend his Section 2255 Motion (D.I. 200) and deny Defendant's Amended Section 2255 Motion (D.I. 189, 200).

**BACKGROUND**

On November 15, 1990, Defendant was indicted on various drug charges. Following a jury trial, Defendant was convicted of two charges, conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 and distribution of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C) and 18 U.S.C. § 2. On November 15, 1991, Defendant was sentenced to 360 months imprisonment to run concurrently on the two charges. In sentencing Defendant, the Court concluded that Defendant was a "career offender" pursuant to Section 4B1.1 of the United States Sentencing Guidelines (the "Guidelines"). The Court based its determination upon Defendant's previous convictions for a crime of violence and a controlled substance offense.

On April 14, 1997, Defendant filed a Section 2255 Motion. (D.I. 189). By his Motion, Defendant sought to collaterally attack a state court conviction that had been used to enhance his

federal sentence under Section 4B1.1 of the Guidelines. In his Motion, Defendant indicated that he had a state court collateral challenge pending and that he filed his Section 2255 motion to preserve his right to seek Section 2255 relief if he was successful in his state court proceedings.

Thereafter, the Court ordered Defendant to advise the Court of the status of his motion for state post-conviction relief. (D.I. 193). Defendant filed a letter in response to the Court indicating that the motion was denied without a hearing, but an appeal was filed. Defendant represented that, as of November 1998, his appeal was still pending in the state court system.

Although several months transpired, the Court received no further updates on the progress of Defendant's appeal. As a result, the Court denied Defendant's pending Section 2255 Motion with leave to renew upon the disposition of Defendant's state court action. (D.I. 198). Shortly thereafter, Defendant filed the instant Motion renewing his Section 2255 Motion and seeking to amend the Motion to add a claim under Apprendi v. New Jersey, 530 U.S. 466 (2000).

The Government has filed a response to Defendant's Renewed Section 2255 Motion and his Motion For Leave To Amend. (D.I. 204).<sup>1</sup> Accordingly, the instant Motion is ripe for the Court's

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<sup>1</sup> Defendant filed a Motion For Expansion Of Time (D.I. 205) to file a Reply Brief. However, Section 2255 and the Rules Governing Section 2255 Proceedings do not contemplate the filing

review.

## DISCUSSION

### I. Defendant's Motion To Amend His Section 2255 Motion To Include An Apprendi Claim

In renewing his previously filed Section 2255 Motion, Defendant seeks to amend his Motion to include a claim that his sentence was invalid under Apprendi v. New Jersey, 530 U.S. 466 (2000).

In determining whether Defendant should be permitted to amend his original Section 2255 Motion to add an Apprendi claim, the Court must consider Rule 15 of the Federal Rules of Civil Procedure. Riley v. Taylor, 62 F.3d 86, 89 (3d Cir. 1995). Rule 15(a) provides that a party may amend his pleading once as a matter of course any time before a responsive pleading is filed. When amendment as a matter of course is not permitted, a party may amend his pleadings by obtaining leave of court, which should be freely given.

Relying on United States v. Duffus, 174 F.3d 333, 337-338 (3d Cir.), cert. denied, 528 U.S. 866 (1999), the Government

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of a traverse by the movant in response to the Government's answer, except in special circumstances. In this case, the Court finds that the issues are straightforward and capable of resolution on the record currently before the Court. As such, the Court concludes that a traverse by Defendant is not warranted, and therefore, Defendant's Motion For Expansion Of Time will be denied. See e.g. United States v. Sanchez, 2002 WL 465297 (E.D. Pa. Mar. 21, 2002) (denying defendant's request for leave to file a traverse where issues were straightforward and capable of being resolved on the record before the court).

opposes Defendant's Motion To Amend on the ground that his amendment does not relate back to his original claims, but adds an entirely new claim. However, the Duffus decision relied on that portion of Rule 15 requiring leave of court to amend. In this case, however, it appears to the Court that Defendant sought to add his Apprendi claim prior to the time that the Government filed its responsive pleading. As such, Defendant was permitted to amend his petition as a matter of course to advance an Apprendi claim. Accordingly, the Court will grant Defendant's Motion For Leave To Amend his Section 2255 Motion.

## **II. Defendant's Amended Section 2255 Motion**

### **A. Defendant's Apprendi Claim**

By his renewed Section 2255 Motion, Defendant contends that his sentence is invalid under Apprendi v. New Jersey, 530 U.S. 466 (2000). Specifically, Defendant contends that he was convicted of two drug counts that did not specify the amount of cocaine and that he was sentenced to a term of imprisonment that exceeded the statutory maximum in violation of Apprendi.

In Apprendi, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. The Court of Appeals for the Third Circuit has recently concluded that Apprendi does not apply

retroactively to cases on collateral review. In re Turner, 267 F.3d 225, 231 (3d Cir. 2001) (joining majority view that Apprendi is not retroactive); United States v. Robinson, 2001 WL 840231 (D. Del. Jul. 20, 2001) (Farnan, J.) (collecting cases). Accordingly, the Court concludes that Defendant is not entitled to relief on his Apprendi claim.

In the alternative, however, even if the Supreme Court were to subsequently make Apprendi retroactive to cases on collateral review, the Court would conclude, as a substantive matter, that Defendant has failed to establish a claim for a violation of Apprendi. In this case, Defendant was convicted of two drug counts that did not specify the quantity of drugs. As such, the mandatory minimum provisions of Section 21 U.S.C. § 841(b)(1) were not invoked. Rather, Defendant was sentenced in accordance with 21 U.S.C. § 841(b)(1)(C) and 21 U.S.C. § 851, because he had a prior drug conviction. Pursuant to 21 U.S.C. § 841(b)(1)(C), Defendant was subject to a maximum period of incarceration of 30 years imprisonment on each count. In this case, Defendant was sentenced to thirty years imprisonment to run concurrently on both of his convictions. Because Defendant's sentence did not exceed the statutory maximum penalty that he was subject to as a result of his prior conviction, the Court concludes that Defendant cannot establish a violation of Apprendi. United States v. Pressler, 256 F.3d 144, 159 (3d Cir. 2001); United

States v. Butch, 256 F.3d 171, 180 (3d Cir. 2001) (requiring under first prong of Apprendi inquiry that defendant's sentence exceed the "prescribed statutory maximum"); see also United States v. Combs, 267 F.3d 1167, 1180-1181 (10th Cir. 2001) ("Apprendi does not require us to reverse where a sentence is equal to the statutory maximum."). Accordingly, the Court will dismiss Defendant's claim that his sentence violated Apprendi.

B. Defendant's Claim That He Was Sentenced Based On A Constitutionally Invalid Prior Conviction

In renewing his Section 2255 Motion, Defendant also requests the Court to adjudicate the claim he initially advanced, i.e. that his sentence was enhanced by a prior state court conviction in Massachusetts that is constitutionally invalid. (D.I. 189). In his renewed Motion and attached affidavit, Defendant does not expand on this claim other than to inform the court of the disposition of his collateral attack. Specifically, Defendant states that he was unsuccessful in pursuing his collateral attack in the Massachusetts appellate court. As for his appeal to the Massachusetts Supreme Court, Defendant contends that his appeal was rejected because it was not properly formatted and his counsel did not submit a corrected application. (D.I. 200, Flaherty Aff. at ¶¶ 1-4).

The United States Supreme Court has held that a defendant cannot collaterally attack a previous state court conviction used to enhance a federal sentence through a federal Section 2255

proceeding. Daniels v. United States, 532 U.S. 374, 382-383 (2001). This rule applies to all federal constitutional challenges to the state court conviction, except for a challenge that the conviction was obtained in violation of the Sixth Amendment right to court-appointed counsel established in Gideon v. Wainwright, 372 U.S. 335 (1963). Id. at 382. ("A defendant may challenge a prior conviction as the product of a Gideon violation, in a 2255 motion, but generally only if he raised that claim at his federal sentencing proceeding.").<sup>2</sup>

To challenge a state court conviction used to enhance a federal sentence, the defendant must pursue the remedies available for that conviction, i.e. direct appeal, post-conviction proceedings under state law and habeas corpus relief pursuant to 28 U.S.C. § 2254. Id. at 381. If the defendant is successful in such a challenge, the defendant may then apply to reopen his federal sentence. Id. at 381-382. However, if the prior conviction is no longer open for direct or collateral

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<sup>2</sup> Defendant has not informed the Court of the grounds upon which he challenged his prior state court conviction in either his original Section 2255 Motion or his renewed Motion, but Defendant has acknowledged that he "has no valid grounds to base his section 2255 motion unless he receives a favorable decision in the state court either modifying or vacating the state conviction used to enhance his federal sentence." (D.I. 189 at 6) (emphasis in original). Accordingly, the Court does not believe that the Gideon exception applies in this case. Further, because Defendant has not provided the Court with any information about his state court conviction, the Court does not believe Defendant is trying to use the instant Section 2255 Motion to substantively attack that conviction.

attack because the defendant failed to pursue his remedies or was unsuccessful in pursuing them, then the conviction is presumptively valid and may be used to enhance the defendant's federal sentence. Id.

Based on Defendant's affidavit, it appears that he was unsuccessful in challenging the state court conviction used to enhance his federal sentence in the Massachusetts state courts. Should Defendant be successful at some point in the future in challenging that conviction through Section 2254 proceedings or renewed state court proceedings, he can petition the Court to reopen his federal sentence. At this point, however, Defendant has not established that the state court conviction used to enhance his federal sentence was invalid. Accordingly, the Court will dismiss Defendant's claim to the extent that it challenges the state court conviction used to enhance his federal sentence.

#### **CONCLUSION**

For the reasons discussed, the Court will grant Defendant's Motion To Renew his Section 2255 Motion, grant Defendant's Motion For Leave To Amend and deny Defendant's Amended Section 2255 Motion (D.I. 189, 200).

An appropriate Order will be entered.

